No. 103

FILED
JUL 12 1960
CLERK, SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

CHARLES W. BAKER, ET AL.,
Appellants,

v.

JOE C. CARR, ET AL.,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

REPLY TO APPELLEES' STATEMENT IN OPPOSITION AND MOTION TO DISMISS

HOBART F. ATKINS,
410 Cumberland Ave., S. W., Knoxville, Tennessee.

ROBERT H. JENNINGS, JR.,
City Attorney, City of Nashville, Nashville, Tennessee.

J. W. ANDERSON,
City Attorney, City of Chattanooga, Chattanooga, Tennessee.

C. R. MCCLAIN,
Director of Law, City of Knoxville, Knoxville, Tennessee.

WALTER CHANDLER,
Chandler, Manire and Chandler, Memphis, Tennessee.

Z. T. OSBORN, JR.,
Denney, Leftwich & Osborn, Nashville, Tennessee.

HARRIS A. GILBERT,
Attorney for City of Nashville, Nashville, Tennessee.

E. K. MEACHAM,
Attorney for City of Chattanooga, Chattanooga, Tennessee.

CHARLES S. RHYNE,
HERZEL H. E. PLAINE,
LENOX G. COOPER,
Rhyne & Rhyne, 400 Hill Building, Washington, D. C.

Attorneys for Appellants.

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I

THE APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION BECAUSE CONTRARY TO THE GUARANTEES OF THE FOURTEENTH AMENDMENT THE COMPLAINING TENNESSEE VOTERS ARE DENIED UNDER COLOR OF STATE LAW THE VOTE EQUAL TO ALL OTHER TENNESSEE VOTERS REQUIRED BY THE STATE CONSTITUTION.

The Attorney General of Tennessee (for the Apellees) purports to make argument on behalf of the complaining voters (Appellants) of which they want no

part. The complaining voters are not charging inequality of representation under the Fourteenth Amendment (Statement in Op., p. 5, 8). On the contrary, they claim equality in voting rights as provided by the Constitution of Tennessee, and charge that the legislative attempt (successful so far) to deny that equality results in a violation of the equal protection of the laws. This is an important distinction, which reflects the manner in which the Fourteenth Amendment operates. It does not in itself decree equality in voting rights. It says that if the state policy is to afford equal voting rights (expressed here by the people of Tennessee in their organic law), the attempt by state officers, under color of law, to deny such equality to some of the citizens is a denial of equal protection.

The fact that this unlawful denial may be perpetrated by, or originate with, the legislators of the state does not prevent the federal courts from dealing with the result [1] and providing relief, even though the decree of the court may not be aimed directly at the legislators themselves.

As Federal District Judge Miller said, the Appellees do not deny "the discrimination, nor do they question the fact that the state legislature has failed and refused to comply with the mandate of the State Constitution" (Jurisdictional Statement, p. 49). The three-judge District Court found that "the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs. . . ." (Jurisdictional Statement, p. 32).

Absent any substantial showing to the contrary, and there has been none, this Court is bound to accept this finding of the District Court.

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[1] *Cooper* v. *Aaron*, 358 U.S. 1.

II

THE COURT HAS AUTHORITY TO GRANT RELIEF WHERE THE DEPRIVATION OF AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS ARE INVOLVED, AND SUCH RELIEF IS ESSENTIAL IN THE CASE.

Notwithstanding Appellees' present assertion that this case affects the people of Tennessee as a polity (Statement in Op., p. 21), the District Court below made clear, as already indicated, that we are here dealing with the deprivation of individual rights. Therefore, cases such as *Nixon* v. *Herndon*, 273 U.S. 536, *United States* v. *Classic*, 313 U.S. 299, *Smith* v. *Allwright*, 321 U.S. 649, and *Terry* v. *Adams*, 345 U.S. 461, are useful precedents, since they represent vindication of individual voting rights which were diluted in one manner or another.

Appellees argue that if vindication of individual rights is permitted in this case, it will result in the destruction of the state government (Statement In Op., p. 23). This is patently not so. We have pointed out that even if the Court chooses to accept the reasoning in *Kidd* v. *McCanless*, 200 Tenn. 282, 292 S. W. 2d. 40 (1956), *appeal dismissed* 352 U.S. 920 (that the state legislature could not function in a *de facto* capacity to make the necessary corrections if a court were to directly invalidate the 1901 Act of Apportionment), there are remedies which avoid encountering the alleged difficulties envisioned in the *Kidd* case, *supra*.

In the recently decided New Jersey Supreme Court decision,[2] which adopted the reasonable course of action already advocated by Appellants in this case (Juris-

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[2] Decided 10 days after the filing of Appellants' Jurisdictional Statement.

dictional Statement, page 25) for curing a similar wrong, the Court said regarding the destruction of government argument:

> There is no doubt, as we have stated, that it is within the competence of the judiciary to adjudge a reapportionment act violative of the Constitution. Some of the defendants suggest that to do so would be to create chaos or anarchy, because no matter how long the filing of our mandate was withheld to permit the enactment of a curative law, the state government would be completely disrupted if the Legislature did not act within that time. Although we agree that if the 1941 Act has become unconstitutional, resort could not be had to an apportionment act of an earlier vintage because any such measure would also be invalid by the same test, we do not believe that the allegedly feared revolt would ever come about. A judiciary, conscious of the sacrosanct quality of its oath of office to uphold the Constitution, cannot accept an *in terrorem* argument based upon the notion that members of a coequal part of the government will not be just as respectful and regardful of the obligations imposed by their similar oath. Any less faith on our part would be an unbecoming and unwarranted reflection on the Legislature."
>
> *Asbury Park Press, Inc.* v. *Woolley*, decided June 6, 1960, by the Supreme Court of New Jersey, p. 11.

The history in cases where courts have assumed jurisdiction bears out the view of the New Jersey Supreme Court that the judicial call to duty has evoked a proper legislative response and has not resulted in the destruc-

tion of any state government (Jurisdictional Statement, p. 23).

The Attorney General of Tennessee urges that the injured voters should be left to *secure* state legislatures that will apportion properly (Statement in Op., p. 25). We have pointed out that the voters of Tennessee, particularly the complaining voters and those similarly situated, have historically been shut off from obtaining a legislature which would correct the abuse, and that only by the assumption of judicial jurisdiction can the corrective processes be set in motion (Jurisdictional Statement, pp. 17-18).

III

THE PREVIOUS DECISIONS OF THIS COURT HAVE NOT DECIDED AGAINST THE RELIEF REQUESTED IN THIS CASE AND THE CIVIL RIGHTS ACT AMENDMENT SUPPORTS IT.

The Attorney General of Tennessee attempts to establish that a group of cases beginning with *Colegrove* v. *Green*, 328 U.S. 549, is precedent for judicial inaction now. The case before the Court is distinguishable from these cases.

In *Colegrove* v. *Green, supra*, there was no declared policy of representation or equal voting in the state constitution, and this Court did not pass upon a state statute which deliberately deviated from that policy to give certain citizens only a part vote and other citizens a full vote. In *McDougal* v. *Green*, 335 U.S. 281, which, like the *Colegrove* case, arose in Illinois where there was no declared state constitutional policy, the Court held that it was allowable to require that candidates for statewide offices should have support which was not limited to a concentrated locality.

In *South* v. *Peters*, 339 U.S. 276, which challenged

the Georgia county unit system, there was the same absence of a declared state policy in the state constitution.

In cases such as *Remmy* v. *Smith*, 342 U.S. 916, the suggestion of the existence of possible alternative remedies appears to have been determinative.

In cases such as *Turman* v. *Duckworth*, 329 U.S. 675, and *Hartsfield* v. *Sloan*, 357 U.S. 916, this Court merely entered *per curiam* orders relying on the earlier cases, which are distinguishable, without discussing the merits.

Kidd v. *McCanless*, 200 Tenn. 282, 292 S.W. 2d 40 (1956), *appeal dismissed*, 352 U.S. 920, cannot be determinative of the issues presented in this appeal. The decision there was that a declaratory judgment, which would invalidate the Tennessee Act of 1901, could not be entered because it would have the effect of eliminating the state legislature *de facto* as well as *de lege*, and would leave no legislative body to carry on, for the corrective and other purposes. Thus, the merits of the federal questions now raised by this case were not considered. In fact, in the case at bar, while the three-judge federal District Court treated *Kidd* v. *McCanless*, *supra*, as one of the cases which appeared to create a problem in the granting of relief, nevertheless, the Court made its own finding on the denial of federally guaranteed rights saying:

> "With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay."
>
> (Jurisdictional Statement, p. 32).

On the question of relief, Appellants suggested in their Jurisdictional Statement that with the added impetus of 28 U.S.C. § 1343(4), federal courts are no longer justified in refusing to exercise equity jurisdiction as in *Giles* v. *Harris*, 189 U.S. 475, and in *South* v. *Peters*, 339 U.S. 276 (Jurisdictional Statement, p. 22). The Attorney General of Tennessee has construed this suggestion to mean that Appellants must rely solely on this 1957 amendment to the Civil Rights Act to support any right to relief (Statement in Op., p. 9).

This is obviously inaccurate. Appellants set forth clearly authoritative precedents for this Court to exercise equity jurisdiction to grant the needed relief, e.g. *Smiley* v. *Holm*, 285 U.S. 355, *Snowden* v. *Hughes*, 321 U.S. 1 (Jurisdictional Statement, pp. 20-22). Moreover, it is fundamental law that a suit for equitable relief from an unconstitutional act can be based directly upon the federal constitution, *Ex Parte Young*, 209 U.S. 123; *Youngstown Sheet and Tube Company* v. *Sawyer*, 343 U.S. 579.

The injured voters are not urging the creation of any new rights as the Attorney General of Tennessee would impute to them. On the contrary, they have relied (among other things) upon 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), which long ago established redress, including equitable relief, in the federal courts for deprivation under color of state law of federally guaranteed rights, including voting rights,[3] and which more

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[3] *Nixon* v. *Herndon*, 273 U.S. 536.
Smith v. *Allwright*, 321 U.S. 649.
Terry v. *Adams*, 345 U.S. 461.
Rice v. *Elmore*, 165 F. 2d 387 (4th Cir. 1947), cert. denied 333 U.S. 875.
Dyer v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii 1956).
Magraw v. *Donovan*, 163 F. Supp. 184 (D. Minn. 1958).

recently have been bolstered specifically by the added paragraph (4) in § 1343, enacted as a separate title in 1957.

Respectfully submitted,

HOBART F. ATKINS,
410 Cumberland Ave., S. W.,
Knoxville, Tennessee.

ROBERT H. JENNINGS, JR.,
City Attorney, City of
Nashville,
Nashville, Tennessee.

J. W. ANDERSON,
City Attorney, City of
Chattanooga,
Chattanooga, Tennessee.

C. R. MCCLAIN,
Director of Law,
City of Knoxville,
Knoxville, Tennessee.

WALTER CHANDLER,
Chandler, Manire and
Chandler,
Memphis, Tennessee.

Z. T. OSBORN, JR.,
Denney, Lefturich & Osborn,
Nashville, Tennessee.

HARRIS A. GILBERT,
Attorney for City of
Nashville,
Nashville, Tennessee.

E. K. MEACHAM,
Attorney for City of
Chattanooga,
Chattanooga, Tennessee.

CHARLES S. RHYNE,
HERBEL H. E. PLAINE,
LENOX G. COOPER,
Rhyne & Rhyne,
400 Hill Building,
Washington, D. C.

Attorneys for Appellants.